



## I

### Facts and Travel

On October 4, 2017<sup>1</sup> and November 1, 2017,<sup>2</sup> the Appellant appeared before the Board on his petition for a special use permit to operate a dog kennel facility at 580 Sisson Road, Coventry, Rhode Island (the Property). The Property is located in an RR-5 Zoning District<sup>3</sup> in which operation of a dog kennel is only permitted with a special use permit. The Appellant's application for the special use permit was originally approved by the Coventry Planning Commission (the Commission). Coventry Planning Commission Minutes, July 27, 2017 (hereinafter, Minutes) The Commission then recommended the approval of the Appellant's application to the Board suggesting that the Board address the breed of dog; the quantity of dogs allowed; and the maintenance of the required kennel licensing requirements. Minutes at 6. After two public hearings, the Board ruled unanimously on November 1, 2017 to deny the Appellant's application for a special use permit. (Tr. 2 at 67.)

During the two public hearings, the Appellant and his attorney, Attorney Martucci, testified in support of the application. The Coventry Zoning Ordinance lists eleven factors the Board must consider in its review of a special use permit application, and satisfactory evidence of these standards must be introduced by an applicant. In the Board's decision,

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<sup>1</sup> Town of Coventry Zoning Board of Review Hearing Transcript of October 4, 2017 (hereinafter, Tr. 1).

<sup>2</sup> Town of Coventry Zoning Board of Review Hearing Transcript of November 1, 2017 (hereinafter, Tr. 2).

<sup>3</sup> "[T]he intent of RR-5 district is to preserve the rural character of the zone." (Tr. 1 at 40.) In an RR-5 district "intensive development is prohibited," but the comprehensive plan "allows for low density development that is conforming with the rural character." *Id.*

the Board addressed each factor and made conclusions of law based upon its findings of fact. Board's Decision, Dec. 6, 2017 (hereinafter, Decision).

On behalf of the Appellant, Attorney Martucci testified that the Appellant intends to operate a kennel for the purposes of dog breeding and selling American Bullies. Tr. 1 at 3. The Appellant already constructed the shell of a 6000 square foot building on the Property prior to the hearing (the Building), which Appellant intends to finish as a kennel. Tr. 1 at 3. Appellant obtained the proper building and zoning requirements to construct the Building as an accessory structure to the principle residence, which was classified as a shed. Tr. 1 at 30. The Building would be insulated and connected to the appropriate utilities. Tr. 1 at 3. The natural vegetation of the Property would serve as a barrier for the noise. Tr. 1 at 23. The Building would contain individual kennels in which the dogs and puppies would live. Tr. 1 at 3. Under the business plan, the business would be conducted online, and the purchased puppies will be delivered to their "forever homes." Tr. 1 at 4. Additionally, under the business plan the puppies would be preordered to prevent the litters being bred in abundance. Tr. 1 at 4. There will be construction of a six-foot fence around the perimeter of the building to allow the dogs to go outside to use the bathroom. Tr. 1 at 5. The dogs will never be left unattended, and the Appellant consulted and will continue to consult with a state licensed veterinarian regarding the safety and medical protocols for dog kennels. Tr. 1 at 6.

The Appellant also testified and answered questions of the Board members. The Appellant stated that he owned American Bullies for about ten years, and he and his girlfriend, Gina, own fourteen dogs. Tr. 1 at 13. The Appellant testified that he has experience raising litters which he received from his uncle, and his girlfriend is a breeder.

Tr. 1 at 16. The Appellant and his girlfriend would be the only two working at the kennel. Tr. 1 at 18. The Appellant requested to have on the Property up to thirty adult dogs which he would own and another 30 puppies until sold or otherwise placed in homes. Tr. 2 at 24. The Building has drains which lead to a septic system that was approved by the Department of Environmental Management. Tr. 1 at 24. The Building will have water, electric, and plumbing. Tr. 1 at 35.

The Board asked Caroline Lacombe, the Coventry Animal Control Supervisor, to conduct some research on the Appellant and to testify during the hearing. Officer Lacombe testified that after talking with the Appellant's animal hospital, she found that the Appellant was a "good dog owner." Tr. 2 at 18. Officer Lacombe further testified that she spoke with Appellant and he agreed to put in higher fencing and a double gating system. *Id.* She requested that the Appellant provide her with an evacuation plan and the name of the transport company he will be using for his dogs. *Id.* Officer Lacombe further voiced her concern regarding whether Appellant and his girlfriend could be available all day long for the dogs and if that was a realistic expectation. Tr. 2 at 18-19.

Finally, numerous members of the public testified at the two hearings. They voiced their concerns about the prospective noise, the breed of dog, preserving the rural characteristics of Zone RR-5, and the potential of the dogs escaping their enclosures. Specifically, Margaret Ferguson, who owns abutting property, testified that she was concerned because if the dogs were to escape, they would be harmed by her livestock or would harm other animals. Tr. 1 at 76. Ms. Ferguson further testified that she does not think a six-foot fence is adequate to contain the dogs as she had a dog that went over an eight-foot fence. Tr. 1 at 76-77. Moreover, William Gallery, who is an owner of a non-

abutting property, testified that a kennel would change the “soundtrack of Sisson Road,” and that the barks will travel across open pastures from a hilltop. Tr. 2 at 8. Mr. Gallery further stated that thirty dogs would produce five and a half to six tons of waste a year, and he raised the question of how the waste will be handled. Tr. 2 at 8-9.

The Board voted to reject the application at the November 1, 2017 hearing. Based on the evidence before it, the Board issued the Decision denying the Appellant’s request for a special use permit. The Appellant timely filed an appeal with proper notice.

## II

### Standard of Review

The standard by which a Superior Court is to review a decision of a zoning board is clearly set out within the Rhode Island General Laws. Upon review, the Superior Court “shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.” Sec. 45-24-69(d). “[A] zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.” *Cohen v. Duncan*, 970 A.2d 550, 561 (R.I. 2009) (quoting *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008)). The Superior Court may reverse or modify a decision of the zoning board only if “substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:

- “(1) In violation of constitutional, statutory, or ordinance provisions;
- “(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
- “(3) Made upon unlawful procedure;
- “(4) Affected by other error of law;
- “(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Sec. 45-24-69(d).

A reviewing court “must examine the entire record to determine whether ‘substantial’ evidence exists to support the [zoning] board’s findings.” *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Board of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). The term “substantial evidence” is defined as “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.” *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981)). The “reasonableness” of the zoning board’s action is assessed in terms of the board’s reliance upon the evidence before it. *Id.* (citing *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)).

### **III**

#### **Discussion**

##### **A**

#### **Sufficiency of the Evidence**

The Coventry Zoning Ordinance governs the issuance of special use permits. The ordinance requires when granting any special use permit, “the Board shall require that evidence to the satisfaction of the following standards be entered into the record of the proceedings:

A. Ingress and egress to the lot and to existing or proposed

structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire, emergency or catastrophe;

B. Off-street parking and loading areas where required (see Article 12), with particular attention to the items in Subsection A above, and to the economic, noise, glare or odor effects of the special-use permit on adjoining lots;

C. Trash, storage and delivery areas with particular reference to the items in Subsection A and B above;

D. Utilities, with reference to locations, availability and compatibility;

E. Screening and buffering with reference to type, dimensions and character (see Article 17);

F. Signs, if any, and exterior lighting with reference to glare, traffic safety, economic effect on and compatibility and harmony with lots in the zoning district (see Article 15);

G. Required yards and other open space;

H. General compatibility with lots in the same or abutting zoning districts;

I. The use will not result in or create conditions that will exceed the Industrial Performance Standards in Article 7;

J. General compatibility with the Coventry Comprehensive Plan; and

K. That the granting will not result in conditions inimical to the public health, safety, morals and welfare.” Coventry Zoning Ordinance, art. IV, § 432.

The burden of proof in a special use permit application is on the applicant; thus, if the applicant fails to present adequate competent evidence to prove that the applicable standard for issuing a special use permit has been met, the zoning board of review must deny the application. *See Dean v. Zoning Board of Review of City of Warwick*, 120 R.I. 825, 831, 390 A.2d 382, 386 (1978); *R-N-R Associates v. Zoning Board of Review of City of Providence*, 100 R.I. 7, 12, 210 A.2d 653, 656 (1965); *Toohey v. Kilday*, 415 A.2d 732, 735 (R.I. 1980). As discussed earlier, the factors that must be met to grant special use permits are found in the Coventry Zoning Ordinances, art. IV, § 432. These factors are conditions precedent to an exercise by the Board of its authority to act affirmatively on an application for a special use permit. *See Iannuccillo v. Zoning Board of Review of Town*

*of Warren*, 103 R.I. 242, 244, 236 A.2d 253, 254 (1967); *Guiberson v. Roman Catholic Bishop of Providence*, 112 R.I. 252, 258, 308 A.2d 503, 506 (1973). Where the conditions and requirements are satisfied, it is an abuse of discretion to deny the requested special use permit. *See Salve Regina College*, 594 A.2d at 880.

The Board found that the evidence presented by Appellant during the two hearings did not satisfy seven of the required standards under the zoning ordinance and voted unanimously to deny the Appellant's application for a special use permit. Decision at 7-9. The Appellant argues that the denial was pretextual and that substantial evidence which was presented to support approval of the application was ignored by the Board. The Board asserts, however, that the record clearly reflects that the Appellant failed to meet his burden to submit sufficient evidence for many of the factors. The Board found that the Appellant "did not present sufficient evidence to address" these seven factors:

- "C. Trash, storage and delivery areas with particular reference to the items in Subsection A and B above;
- "D. Utilities, with reference to locations, availability and compatibility;
- "E. Screening and buffering with reference to type, dimensions and character (see Article 17);
- "G. Required yards and other open space;
- "H. General compatibility with lots in the same or abutting zoning districts;
- "J. General compatibility with the Coventry Comprehensive Plan; and
- "K. That the granting will not result in conditions inimical to the public health, safety, morals and welfare." *See Coventry Zoning Ordinance*, art. IV, § 432.

For the Board to have the authority to grant Appellant's special use permit, the Appellant must have met all the standards established by the zoning ordinance. *See Iannuccillo*, 103 R.I. at 244, 236 A.2d at 255. This Court finds that the Appellant failed to present competent evidence with respect to at least three of the factors, and therefore, it

would have been an abuse of discretion if the Board granted the special use permit.<sup>4</sup> *See id.* First, the Board found under Factor D, “[u]tilities, with reference to locations, availability and compatibility,” that there was no evidence presented on utilities except for the Appellant asserting that the kennel would be served by electricity, water, and plumbing. Decision at 7; *See Coventry Zoning Ordinance*, art. IV, § 432. The Board concluded that there was no other evidence showing the utilities and if any additional utilities were needed for the proposed kennel. Decision at 7. The Appellant contends that the Zoning Enforcement Officer testified that the Building was approved for a building permit and it will have the adequate utilities for an accessory structure. Appellant’s Br. at 12-13. However, the Appellant mistakenly equates this testimony as evidence that the Building will have proper utilities to support a kennel. *See* Tr. 1 at 30. After reviewing the record as a whole, this Court finds that the Appellant failed to present any evidence as to whether the kennel will be supported by the proper utilities except for the Appellant’s general statement that the building will have utilities. *See id.* Consequently, the Board’s determination that Appellant did not satisfy this factor was supported by the lack of evidence on the record to show compliance with this factor. *See Salve Regina College*, 594 A.2d at 880.

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<sup>4</sup> This Court shall only address three of the prerequisite factors, as this Court finds that it is evident that the Appellant failed to meet his burden as to these factors. If the Appellant fails to meet just one of these factors, the Board does not have the authority to grant the special use permit. *See Iannuccillo*, 103 R.I. at 244, 236 A.2d at 254. For the purpose of discussion, the Court questions whether the Board evaluated the proper evidence when considering some of the factors, specifically Factors C, E, and G. It appears that the Board was examining issues that were not required to be determined under these factors. While the Court is concerned about these findings of the Board, it is unnecessary for the Court to address this issue as the Board did have sufficient evidence on the record to determine that Factors D, J, and K were not met.

Furthermore, after examining the evidence presented as to factor J, “[g]eneral compatibility with the Coventry Comprehensive Plan,” the Board found that the Appellant failed to provide any evidence showing that the proposed use was compatible with the comprehensive plan. Decision at 8; *See* Coventry Zoning Ordinance, art. IV, § 432. The Board made a factual finding that the Appellant proposed a kennel operation that would house a maximum of sixty dogs and that the RR-5 Zone allows for non-residential uses that are limited to low intensity uses. Decision at 5. The Board then concluded that a kennel housing sixty dogs does not qualify as a low intensity use required by the Comprehensive Plan. Decision at 8-9. The Appellant contends that he presented ample evidence regarding the proposed use’s compatibility with the Comprehensive Plan; specifically, he maintained that his attorney testified there would be no high intensity development proposed. Appellant’s Br. at 17. However, while the Appellant provided testimony that no other development would occur, the record is devoid of evidence showing that a kennel housing up to 60 dogs would be a low intensity use. Thus, the Appellant again failed to present any competent evidence with respect to this factor which is a prerequisite to granting the requested relief. *See Salve Regina College*, 594 A.2d at 880.

Finally, as to factor K, “the granting will not result in conditions inimical to the public health, safety, morals and welfare,” the Board further found that the Appellant did not present sufficient evidence that his requested relief would not result in conditions inimical to the public health, safety, morals and welfare. Decision at 9. The Board determined that there was no evidence presented as to how the dogs’ waste would be disposed of, other than going into the town garbage collection; on the level of noise that the dogs would produce and if the measures proposed to prevent noise would be sufficient;

and if the proposed fence would prevent the dogs from escaping. *Id.* The Board further relied upon the testimony of Officer Lacombe and found that it is unrealistic to expect two people to be able to care for up to thirty adult dogs and thirty puppies. *Id.* The Appellant contends that the Board ignored significant evidence on the record which shows that he proposed a plan for proper waste disposal and noise prevention and that he will construct a chain link fence to prevent the dogs from escaping.

The record reveals that the Appellant testified that he will dispose of the dogs' waste in the town trash and hire private disposal if necessary; he will insulate the Building; the vegetation around the property will reduce the noise; and that he would build up to an eight-foot fence to prevent the dogs from escaping. Tr. 1 at 3, 23; Tr. 2 at 18. Additionally, Officer Lacombe testified that there should be someone always on the Property with that number of dogs and it was an unrealistic expectation that the Appellant and his girlfriend would never leave the Property. Tr. 2 at 18-19.

The Court finds that while the Appellant did put forth his own testimony to show the Board that he had a plan for the noise, waste, and control of dogs, he did not put forth any additional evidence to support the effectiveness of his plans. There is no evidence on the record as to how much waste and noise the dogs would produce, and if the Appellant's proposed procedures were adequate. Consequently, this Court can find no sufficient basis for determining that the Appellant's proposed procedures would prevent any conditions that would be inimical to the public health, safety, morals and welfare. *See Iannuccillo*, 103 R.I. at 244, 236 A.2d at 254. The Board's finding that the Appellant did not satisfy his burden in proving that the proposed use would not have negative effects upon the community's health and welfare was supported by the lack of probative evidence on the

record to show the effectiveness of the Appellant's proposed procedures. *See Dean*, 120 R.I. at 831, 390 A.2d at 386; *Toohey*, 415 A.2d at 735.

The Appellant's failure to provide competent evidence for these three factors is fatal to the Appellant's application. *See Iannuccillo*, 103 R.I. at 244, 236 A.2d at 255 ("Absent such evidence, the board was without authority to grant the special exception."). The Appellant was required to present evidence to the Board to show that all eleven factors had been met, and if the Appellant failed to meet even one factor, the relief must be denied. *See Melucci v. Zoning Board of Review of City of Pawtucket*, 101 R.I. 649, 651, 226 A.2d 416, 418 (1967); Coventry Zoning Ordinance, art. IV, § 432. After a review of the entire record, this Court finds that the Board's conclusion was neither clearly erroneous nor arbitrary, capricious or an abuse of discretion.

## **B**

### **Impermissible Considerations**

The Appellant further contends that the Board's Decision must be reversed because the Board improperly considered the breed of the dogs in the kennel when making its determination, which is prohibited by state law. When the Commission made a recommendation to the Board to grant the Appellant's application, it advised the Board to consider multiple issues; one issue was the breed of dogs. Appellant contends that this recommendation was an illegal recommendation, which resulted in the Appellant being forced to rebut questions asked by the Board pertaining to the breed of his dogs. The Appellant asserts that while the Board did not include any information about the breed of his dogs in its findings of fact, the transcript of the hearings demonstrates that this illegal factor contributed to the Board's Decision. Contrarily, the Board asserts that any

recommendation by the Commission is advisory and not binding, and that no consideration of the breed was made in the written Decision.

Rhode Island General Laws § 4-13-43 provides “[n]o city or town may enact a rule, regulation or ordinance specific to any breed of dog or cat in the exercise of its power to further control and regulate dogs, cats or other animals as authorized by this chapter.” Under the Coventry Zoning Ordinance, there are no restrictions placed upon what breed of dogs may be kept in a kennel. If the Board were to deny the application based on the breed of dog being kept in the kennel, that decision would be improper. *See* § 45-24-69(d).

The record reflects that the Board did have concerns and questions about the breed of dog, American Bully, that the Appellant intended to keep and breed at his proposed kennel. During the hearings, one of the Board members stated that he was afraid of American Bullies after looking at a picture of the breed and that the dogs looked tough. Tr. 1 at 106. Another Board member asked the Appellant if the dogs were a banned breed. Tr. 1 at 19. Many of the Board members and neighbors who testified made statements and asked questions evidencing that they equated American Bullies to Pit Bulls. Tr. 1 at 27, 63, 100. However, while the record reveals that many of the Board members and members of the public were apprehensive regarding the Appellant’s breeding of American Bullies and of the breed entirely, this Court does not find evidence on the record that the Board based its final Decision on the breed of the dogs. This Court will not speculate as to whether this improper consideration was the basis for the Board’s Decision when there is substantial evidence supporting their Decision to deny the application.

## **IV**

### **Conclusion**

After review of the record, this Court finds that the Decision issued by the Board denying a special use permit is based upon reliable, probative and substantial evidence and is not clearly erroneous. Substantial rights of Appellant have not been prejudiced. Accordingly, this Court affirms the Board's Decision denying the Appellant's application for a special use permit.



**RHODE ISLAND SUPERIOR COURT**

*Decision Cover Sheet*

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**TITLE OF CASE:** Joshua Correia v. The Town of Coventry, et al.

**CASE NO:** KC-2017-1303

**COURT:** Kent County Superior Court

**DATE DECISION FILED:** September 27, 2019

**JUSTICE/MAGISTRATE:** Licht, J.

**ATTORNEYS:**

For Plaintiff: Ryanna Tyler Capalbo, Esq.; Andrew R. Bilodeau, Esq.

For Defendant: Jane Gurzenda, Esq.